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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBERTA GAS CHEMICALS, LTD., *Plaintiff,* v. CELANESE CORPORATION AND CELANESE CHEMICAL COMPANY, INC., *Defendants.*	MEMORANDUM OPINION AND ORDER 80 CIV. 1855 (ADS)

ABRAHAM D. SOFAER, D. J.:

In this diversity action, Alberta Gas Chemicals, Ltd. ("Alberta Gas") sues for alleged fraud and unfair competition by Celanese Chemical Co., Inc. ("Celanese"), a wholly owned subsidiary of Celanese Corp. Alberta Gas is Canada's largest producer of methanol; Celanese is the largest producer of methanol in the United States. Alberta Gas claims that Celanese engaged in "an unlawful scheme and plan designed, among other things, to delay or prevent Alberta Gas from constructing additional facilities to produce methanol" in Canada and to reduce plaintiff's capacity to compete with Celanese. (Complaint ¶ 8.) The alleged scheme consists entirely of Celanese's conduct at a hearing before the United States International Trade Commission ("Commission"), held to determine whether imports of methanol from Canada were injuring, or were likely to injure, the domestic methanol-producing industry.

Specifically, Celanese is alleged to have "intentionally presented materially false and misleading testimony to the

Commission relating to the principal issues before the Commission, including (i) the failure to disclose Celanese's plans for the substantial expansion of its . . . methanol producing facilities in Alberta and the United States, and (ii) the projected demand for methanol." (Complaint ¶ 8.) Celanese allegedly failed to tell the Commission that it was planning to construct extensive new facilities to produce methanol. (Complaint ¶ 9.) Moreover, Celanese testified that demand for methanol would increase in the United States during the 1980's at a rate no greater than 6% to 7%, whereas it allegedly "believed at the time . . . that the demand for methanol in the United States during that period would increase at a rate of at least 10% per annum." (Complaint ¶ 10.)

The Commission concluded unanimously that imports of methanol from Canada were not currently injuring the domestic methanol-producing industry, but determined by a vote of three to two that Canadian imports were likely to injure the industry in the future. Once the Commission made its finding of possible future harm, the Treasury Department was required to issue a so-called Finding of Dumping under the Anti-Dumping Act of 1921, 19 U.S.C. §§ 160-171. The effect of this finding was to subject future imports of Canadian methanol to a special dumping duty.

Plaintiff's claim of injury and prayer for relief rest ultimately on its allegation that "[u]pon information and belief, had Celanese Chemical stated the truth as it was known to it with respect [to its expansion plans] and the demand for methanol in the United States, the Commission would not have found that there was a likelihood of future injury to the United States methanol industry by reason of the sale of methanol to the United States by Alberta Gas." (Complaint ¶ 11.) Alberta's alleged injuries have resulted solely from the Commission's determination, so for plaintiff to succeed that determination must be shown to have been caused by Celanese's alleged misrepresentations.

Defendant Celanese moves to dismiss the complaint on three grounds: (1) lack of jurisdiction; (2) failure to exhaust

administrative remedies; and (3) failure to state a cause of action. All three contentions seem meritorious, but dismissal is now granted for plaintiff's failure to state a cause of action.

Under New York law, "a plaintiff who has lost his case because of perjured testimony cannot sue the perjurer for damages." *Anchor Wire Corp.* v. *Borst*, 277 App. Div. 728, 729, 102 N.Y.S.2d 871, 872 (1st Dep't 1951). Indeed, the rule is universally recognized as necessary to prevent matters from being endlessly relitigated. "Thus, the losing party's remedy is limited to a direct appeal in the case where the alleged perjury occurs." *Newin Corp.* v. *Hartford Accident & Indemnity Co.*, 37 N.Y.2d 211, 217, 371 N.Y.S.2d 884, 889-90, 333 N.E.2d 163, 166 (1975). *See Generally* 70 C.J.S. *Perjury* ¶ 92 (1951 & Supp. 1979); Annot., 54 A.L.R.2d 1298 (1957 & Supp. 1978).

Plaintiff correctly asserts an exception to this rule "where the perjury is merely a means to the accomplishment of a larger fraudulent scheme." *Newin Corp.* v. *Hartford Accident & Indemnity Co., supra*, 37 N.Y.2d at 217, 371 N.Y.S.2d at 890, 333 N.E.2d at 166. The " 'compelling policy that fraud be frustrated [requires] . . . that one who defrauds not gain sanctuary merely because a narrow issue, by very reason of his fraud, has been determined in his favor. If the total objective of the scheme was the determined issue, then there is a bar; but if the total objective was greater than the determined issue, and the determined issue was but a step or a part of the total objective, then there is no bar.' " 37 N.Y.2d at 218, 371 N.Y.S.2d at 890, 333 N.E.2d at 167 (quoting *Burbrooke Manufacturing Co.* v. *St. George Textile Corp.*, 283 App. Div. 640, 643-44, 129 N.Y.S.2d 588, 592 (1st Dep't 1954) (Breitel, J.)).

Plaintiff fails to come within this exception. It alleges that defendant's conduct at the Commission also was intended "to delay or prevent Alberta Gas from constructing additional facilities to produce methanol in Alberta . . . ." (Complaint ¶ 8.) But this allegation is insufficient to create a larger scheme of which the perjury was merely a part. The larger scheme

must entail some conduct on the tortfeasor's part other than simply the perjury itself. Even if Celanese offered perjured testimony to injure Alberta Gas, it did nothing else; and all the consequences of what it did resulted from its conduct before the Commission and from the Commission's finding. As in *Levy* v. *Hayward*, 248 F.2d 152, 153 (D.C. Cir. 1957) (per curiam), *cert. denied*, 356 U.S. 941 (1958), defendant's alleged fraud involved no "fraudulent conduct beyond the giving of false testimony." *Cf. Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (perjury part of broader antitrust conspiracy). In fact, plaintiff was offered the opportunity at oral argument to amend the complaint so as to allege fraudulent conduct other than the perjury, but declined to do so.

Perhaps recognizing that it fails to allege additional fraudulent conduct, plaintiff interprets New York law to permit a suit if the injured party had no effective remedy at the earlier proceeding, because the new claim is broader than or different from the claim in the prior proceeding. But *Newin* stands for no such broad proposition. *Newin* was a fraud action in which plaintiffs were beneficiaries of an excess liability insurance policy and claimed that, by procuring perjured testimony, the primary insurer effectuated a settlement for an amount less than the primary coverage. Apparently, no fraudulent conduct was alleged in addition to the conduct that had occurred at the earlier action.[1] But the plaintiffs in the succeeding action—unlike the plaintiff here—were not parties to the original action in which the perjury took place and therefore "had no effective remedy in the prior action." 37 N.Y.2d at 218, 371 N.Y.S.2d at 891, 333 N.E.2d at 167. Plaintiffs in *Newin* had in fact objected at the earlier proceeding to the bankruptcy referee's approval of the settlement allegedly procured by fraud, but the referee "refused to make any finding on the validity of the plaintiffs' fraud charges." 37 N.Y.2d at 215, 371

[1] *But see* 37 N.Y.2d at 218 n.*, 371 N.Y.S.2d at 890 n.*, 333 N.E.2d at 167 n.* (plaintiffs allege conspiracy "to create such a hiatus between settlement and coverage. . . as to frustrate payment").

N.Y.S.2d at 887, 333 N.E.2d at 165. *Newin* would therefore appear to preclude a collateral attack on the bankruptcy referee's findings by any party who had the opportunity to claim fraud at those proceedings and did not do so, or in cases in which the issue of fraud was resolved as a result of a party's claim.

If *Newin* could be read as expansively as plaintiff claims, then it could not be followed in the federal courts, and its application in the state courts might well be preempted in cases that are essentially collateral attacks on determinations made by federal agencies or courts under grants of specific and exclusive jurisdiction. The scope and effect of a federal decree is governed by federal law. *See Nichols* v. *Alker*, 231 F.2d 68, 75 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956).[2] The sole issue that would be placed before the state courts under plaintiff's complaint, or before this Court in diversity, is whether the Commission's determination was properly reached. The effect of plaintiff's succeeding in its claim for damages would be to shift from Alberta Gas to Celanese the cost of the dumping duties imposed by the Commission upon Alberta Gas. This would undermine the purpose of the Commission's order, designed as it was to prevent Alberta Gas from harming the American methanol industry, including Celanese. Alberta Gas would not be deterred by the duties, as the Commission intended; and Celanese would not be protected. As for plaintiff's other claims for equitable relief, their obvious purpose is to obtain decrees or orders that would further nullify the Commission's determination.

Even if plaintiff's complaint stated a cause of action, this Court's jurisdiction over this dispute seems dubious. Congress has created a detailed and comprehensive administrative scheme by which to regulate "dumping" of foreign products in this nation, and it has granted to the Customs Court "exclusive

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[2] In *Nichols*, Judge Frank clearly stated the rule that a subsequent damage action based on perjury is only permitted when the perjury is "but an incident" to a larger fraudulent scheme. 231 F.2d at 80-81 (concurring opinion).

jurisdiction" over actions challenging orders or findings made in the administrative process. *See generally SCM Corp.* v. *United States,* 450 F. Supp. 1178 (Cust. Ct. 1978); 28 U.S.C. § 1582(a).[3] The proper statutory procedure for challenging the Treasury's Finding of Dumping is to protest the payment of any dumping duty imposed and to commence an action in Customs Court if the protest is denied. Alberta Gas filed such a protest on August 20, 1979, raising in general terms the contention that the Commission's finding of possible future injury was invalid and void, but failing to assert in any detail the claim that the Commission relied on false testimony. *Alberta Gas Chemicals, Inc.* v. *United States,* Civ. No. 79-8-01295 (Cust. Ct.), reprinted in Defendant's Memorandum of Law, App. D.

Plaintiff replies that this case arises under the law of fraud and unfair competition and seeks remedies (damages) unavailable under the Anti-Dumping Act. This argument is disingenuous. Plaintiff seeks more than just damages in this case. It seeks equitable relief, presumably including at least a declaration that the Commission was misled by false testimony and would have reached a different result but for that testimony. Moreover, the claim for damages might be mooted if the Commission's determination were changed, since plaintiff's damages apparently all result from the Commission's decision. In any event, even if this case could be distinguished on the basis of the relief claimed, a state would lack power to create a cause of action based solely upon the allegedly erroneous action of a federal agency—especially if that agency's action was not yet final. Any challenge to the Commission's findings must, by statute, be brought in the Customs Court.

Finally, even if plaintiff stated a cause of action and this Court had jurisdiction over it, the doctrine of primary jurisdiction would constrain us from hearing the case at this time. The central issue in this case is whether, but for Celanese's alleged

[3] An earlier effort by plaintiff to circumvent established statutory procedures was rejected by the Customs Court. *Alberta Gas Chemicals, Inc.* v. *Blumenthal,* 467 F. Supp. 1245 (Cust. Ct. 1979).

misrepresentations, the Commission would have refused to impose dumping duties upon Alberta Gas. Rather than second-guessing the Commission, we would stay action pending the Commission's redetermination of its decision. A finding by the Commission that its order was appropriate despite the purported misrepresentations would preclude plaintiff from establishing the requisite causation. *See generally Far East Conference* v. *United States,* 342 U.S. 570, 574-75 (1975); *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752, 767-68 (1947). The claim that, by placing perjured testimony before the Commission, Celanese caused it to reach an erroneous result belongs in the federal administrative process, although the Department of Justice is also empowered to act if it is satisfied that perjury occurred in a federal proceeding. *See* 18 U.S.C. §§ 1001, 1621.

The complaint is therefore dismissed for failure to state a claim on which relief may be granted. Fed. R. Civ. P. 12(b)(6).

SO ORDERED.

Dated: New York, New York
October 6, 1980.

/s/ ABRAHAM D. SOFAER

Abraham D. Sofaer
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 782, Docket 80-9021

(Argued February 26, 1981 Decided May 12, 1981)

ALBERTA GAS CHEMICALS, LTD.,

Plaintiff-Appellant,

V.

CELANESE CORPORATION and
CELANESE CHEMICAL COMPANY, INC.,

Defendants-Appellees.

Before:

FEINBERG, *Chief Judge,* OAKES, *Circuit Judge,*
and MOTLEY, *District Judge**

* Honorable Constance Baker Motley, United States District Judge, Southern District of New York, sitting by designation.

FEINBERG, Chief Judge:

This appeal raises unusual issues regarding the power of an administrative agency to insure the integrity of proceedings before it. Alberta Gas Chemicals, Ltd. (Alberta), a Canadian corporation, appeals from a judgment of the United States District Court for the Southern District of New York, Abraham D. Sofaer, J., dismissing Alberta's complaint against Celanese Corporation and Celanese Chemical Company, Inc., 497 F.Supp. 637 (collectively referred to as Celanese). The complaint alleged that Celanese had perpetrated a scheme to defraud and unfairly compete with Alberta by interfering with its construction of new facilities in Canada, and by hindering its efforts to sell methanol in the United States.[1] The gravamen of the complaint was that Celanese presented false testimony before the United States International Trade Commission (Commission), which was considering whether imports from Canada were injuring, or were likely to injure, the domestic methanol producing industry. On Celanese's motion, Judge Sofaer dismissed Alberta's complaint. As indicated below, we adopt one of the alternate grounds indicated in the opinion of the district court, and remand this case to the district court to be held pending further proceedings in accordance with this opinion.

I

The relevant facts may be simply stated: In March 1979, the Treasury Department concluded that Canadian methanol, exported by Alberta, was being sold in the United States at less than fair value. 44 Fed.Reg. 19,090 (March 30, 1979). This triggered hearings before the Commission in May 1979 pursuant to the Antidumping Act, 19 U.S.C. § 160 et seq., to determine whether the sale here of the Canadian methanol at less than fair value was likely to injure the American methanol

[1] Methanol is an organic chemical used primarily in manufacturing other chemicals and as a solvent.

industry.[2] At the hearing, the Commission received oral and written testimony from many of those involved in the American methanol industry, including employees of Celanese, this country's largest producer. 44 Fed.Reg. 40,734—35 (July 12, 1979).

In June 1979, the Commission decided by a 3-2 vote that the sale in this country of Canadian methanol was likely to be detrimental to domestic producers in the future. This finding of possible future harm required the Treasury Department to issue a Finding of Dumping under 19 U.S.C. § 160(a), thus subjecting future imports of Canadian methanol to a special antidumping duty. See 44 Fed. Reg. 44,154 (July 27, 1979). In August 1979, Alberta challenged this determination by filing an action in the United States Court of International Trade.[3]

According to Alberta, it discovered in November 1979 that Celanese employees had perjured themselves in the antidumping proceeding before the Commission by failing to disclose Celanese's plans to expand substantially its methanol producing facilities in Canada and in the United States, and by deliberately underestimating the projected United States demand for methanol. By the time Alberta allegedly discovered this perjury, it had already filed its action in the Court of International Trade, as indicated above. Nevertheless, Alberta did not utilize this information in connection with its case pending there. Nor did Alberta call the alleged perjury to the attention of the Commission. Instead, it filed the present action in April 1980 in the Southern District basing jurisdiction on diversity. Alberta, as already indicated, alleged that Celanese was engaged in an unlawful scheme to hinder Alberta's efforts to

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[2] The antidumping provisions now appear as part of the Tariff Act of 1930, 19 U.S.C. § 1671 et seq. Because the proceedings at issue here were conducted under the old law, we will refer throughout this opinion to the provisions of the Antidumping Act.

[3] Since the district court filed its opinion, the United States Customs Court has been renamed the United States Court of International Trade. See Customs Courts Act of 1980, Pub. L. No. 96—417 (Oct. 10, 1980). For purposes of clarity, we will refer to the court as the Court of International Trade.

produce methanol in Canada and to sell it in the United States, of which the perjury before the Commission was an integral part. The complaint further alleged that the Commission would not have concluded that future importation of Canadian methanol was likely to hurt domestic producers but for the perjured testimony. The complaint prayed for an injunction requiring Celanese to disclose the true facts to the Commission, and also sought damages, both compensatory and punitive.

In its answer, Celanese denied the essential allegations of the complaint, including the perjury, and moved for judgment on the pleadings. Celanese asserted in the alternative that the district court either lacked jurisdiction, or should not exercise its jurisdiction, and that even if the court did reach the merits, the complaint did not state a claim upon which relief could be granted. In a memorandum opinion and order dated October 8, 1980, Judge Sofaer concluded that under federal law, appellant's complaint failed to state a cause of action because it did not allege any wrongful conduct on the part of Celanese other than the alleged perjury before the Commission. The judge went on to say that even if the complaint did state a cause of action, the federal court's jurisdiction over the dispute seemed "dubious" because the matter was within the exclusive jurisdiction of the Court of International Trade; finally, the court noted that under the doctrine of primary jurisdiction the issues relating to Celanese's conduct during the hearing before the Commission should be resolved, in the first instance, by the Commission. This appeal followed.

II

Based upon the foregoing, the parties have presented and thoroughly briefed a number of legal issues, but we do not find it necessary or appropriate to reach most of them. It is quite clear to us that Alberta is trying to obtain a reversal of the Commission's ruling without bothering to attempt to utilize other remedies available to it, and we see no reason to countenance such use of the federal courts.

The claimed perjurious testimony by Celanese related to its plans to expand its methanol production capacity and to its estimate of demand for methanol in the United States. The district court found that the "central issue" in this litigation was whether "but for Celanese's alleged misrepresentations, the Commission would have refused to impose dumping duties on Alberta Gas." Alberta disputes this, arguing that a decision in its favor in this lawsuit would not affect the Commission's determination that imports of Canadian methanol were likely to injure the American methanol industry. Whether or not this is so—and it seems unlikely—the only specific fraudulent action that Alberta asserted in the district court was the alleged perjury before the Commission.[4] Moreover, to prove that it suffered damage from the alleged perjury, Alberta must show that this testimony influenced the Commission to come to a result it would not otherwise have reached. Without that connection, Alberta's damages would be caused by the legitimate action of the Commission, and not by the allegedly tortious conduct by Celanese.

Under the circumstances, it makes good sense to allow the Commission to determine initially whether there was perjury and if there was, whether the perjury affected the result before the Commission. There can be little doubt that the Commission's "insight gained through experience," *Far East Conference v. United States,* 342 U.S. 570, 574-75, 72 S.Ct. 492, 494-495, 96 L.Ed. 576 (1952), will be helpful in determining whether Celanese employees misrepresented the estimated United States demand for methanol and Celanese's intentions

[4] In its brief and argument before this court, Alberta asserted that Celanese had in 1976 "vigorously opposed" Alberta's application to build a methanol production facility in Canada, and that some "90 days after the Commission's decision" in 1979, in an application to the Alberta Energy Resources Conservation Board, Celanese had made a "complete reversal" of its earlier estimate of the demand for methanol in the United States. Celanese alleges that neither of these arguments was presented to the district court. Even if properly before us, however, these allegations do not change the focus of the complaint on the alleged perjury before the Commission.

concerning the construction of additional production facilities. Resolution of such questions will be materially aided by the Commission's knowledge of how such estimates and projections are customarily calculated, utilized, and revised, by its intimate familiarity with the record of the entire antidumping proceeding, and by its expertise in the field of international commerce. Moreover, the Commission will certainly be in a far better position than the district court to determine whether it would have reached a different conclusion but for the allegedly perjured testimony. Indeed, appellant does not seriously argue that the Commission would not be in a better position than the district court to resolve these issues initially. Rather, appellant contends that the Commission lacks the authority either to reconsider its decision or to grant the relief Alberta seeks in this action. We find both arguments without merit.

Alberta contends that the Commission cannot reconsider a prior determination on the basis of newly discovered facts, if they existed at the time of the initial decision. Appellant claims that the Commission regulations that deal with altering or amending a prior determination apply only when circumstances have changed since the initial decision, or to correct technical errors. 19 C.F.R. §§ 207.45–46. Whether or not this construction of the regulations is correct, a more fundamental source of authority exists for allowing the Commission to determine initially the issues in this litigation: the inherent power of any administrative agency to protect the integrity of its own proceedings.

"The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question." *Universal Oil Co. v. Root Refining Co.*, 328 U.S. 575, 580, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447 (1946). The Court there cited *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1943), in which the Court stated, "[t]his equity rule, which was firmly established in English practice long ago before the foundation of the republic, . . . [was] developed and fashioned to fulfill a universally recognized need for correcting injustices which . . . are deemed sufficiently gross

to demand a departure from rigid adherence to . . . the rule [of finality]." Id. at 244, 64 S.Ct. at 1000. See also 7 Moore's Federal Practice ¶ 60.16[5] at 88–90 (1979). This inherent power has been confirmed by the Federal Rules of Civil Procedure. See Fed.R.Civ.P. 60(b); 7 Moore's Federal Practice ¶ 60.33.

This universally accepted rule has been applied to proceedings before federal administrative agencies. Professor Davis states that "[e]very tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately to modify its judgment, decree, or error." 2 K. Davis, Administrative Law Treatise § 18.09 at 606 (1958). As the Court of Claims has pointed out, "it is often the case that reconsideration of a prior decision, within a reasonable period of time, is absolutely essential to the even administration of justice. . . . [I]t may be imperative for the tribunal to consider new developments or newly discovered evidence in order to facilitate the orderly and just resolution of conflict. More frequently, reconsideration is often the sole means of correcting errors of procedure or substance." *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct.Cl. 1972). See also *United States v. Sioux Tribe*, 616 F.2d 485, 493 (Ct.Cl.), *cert. denied*, 446 U.S. 953, 101 S.Ct. 2716, 65 L.Ed.2d 844 (1980) ("It is a well established principle that an administrative agency may reconsider its own decisions. 'The power to reconsider is inherent in the power to decide.' ").

It is hard to imagine a clearer case for exercising this inherent power than when a fraud has been perpetrated on the tribunal in its initial proceeding. In *Greene County Planning Board v. Federal Power Commission*, 559 F.2d 1227, 1233 (2d Cir. 1976), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 591 (1978), we stated that "an agency does have an obligation to make corrections when it has been relying on erroneous factual assumptions . . . ." See also *Hudson River Fishermen's Association v. Federal Power Commission*, 498 F.2d 827, 833-34 (2d Cir. 1974). Here, according to Alberta's allegations, the Commission relied on "erroneous factual

assumptions" that were deliberately presented by Celanese's witnesses to persuade the Commission to reach an incorrect conclusion concerning the possible future effects of the importation of Canadian methanol. The public interest in preventing perjury is obvious; and there is also a clear public interest in a correct determination of whether imports of methanol should be restricted, since the restrictions will almost certainly affect the price American consumers pay for this product. These considerations far outweigh any interest in the finality of the Commission's initial determination, particularly when the Commission's decision is still pending before the Court of International Trade.

Alberta's other objection to requiring it to seek relief initially from the Commission is that the Commission has no power to award damages. This argument misperceives the nature of the doctrine of primary jurisdiction. As Professor Davis points out, "[t]he test is not whether some parts of the case are within the exclusive jurisdiction of the courts; the test is whether some parts of the case are within the exclusive jurisdiction of the agency. Because of the purpose of the doctrine—to assure that the agency will not be by-passed on what is especially committed to it—and because the resort to the courts is still open after the agency has acted, the doctrine applies even if the agency has no jurisdiction to grant the relief sought." *Davis, supra,* § 19.07 at 39. The Supreme Court has consistently followed this approach by remanding cases for initial resolution by administrative agencies, when it was undisputed that those agencies did not have the power to award the damages sought in the federal court action. See, e.g., *Thomson* v. *Texas Mexican Railway,* 328 U.S. 134, 66 S.Ct. 937, 90 L.Ed. 1132 (1946); *General American Tanker Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422, 60 S.Ct. 325, 84 L.Ed. 361 (1940); *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 464, 69 S.Ct. 1410, 1430, 93 L.Ed. 1451 (1949) (Frankfurter, J., dissenting).

We find no reason, therefore, not to give the Commission the opportunity to resolve in the first instance the major issues

in this litigation. We believe that the Commission's decision as to whether Celanese employees perjured themselves before the Commission, and if so, whether but for such perjury the Commission would have reached a different result, will materially affect, or perhaps even definitively conclude, the federal action now before us. In light of our disposition of this case, we find it unnecessary to address appellee's argument that this matter falls within the exclusive jurisdiction of the Court of International Trade, or the district court's conclusion that apppellant failed to state a cause of action.

The case is remanded to the district court with instructions to stay all proceedings before it until such time as the Commission determines whether (1) Celanese employees did commit perjury during the Canadian methanol proceeding, and (2) whether but for such perjury, the Commission would have reached a different conclusion regarding the possible future effects of the importation of Canadian methanol.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBERTA GAS CHEMICALS, LTD., *Plaintiff,* v. CELANESE CORPORATION AND CELANESE CHEMICAL COMPANY, INC., *Defendants.*	ORDER 80 CIV. 1855 (ADS)

ABRAHAM D. SOFAER, D.J.:

Pursuant to and on the basis of the order of the Court of Appeals dated May 12, 1980, this action is hereby stayed and placed on the suspense calendar of this court "until such time as the Commission determines whether (1) Celanese Employees did commit perjury during the Canadian methanol proceeding, and (2) whether but for such perjury, the Commission would have reached a different conclusion regarding the possible future effects of the importation of Canadian methanol."

SO ORDERED.

Dated: New York, New York
July 6, 1981

/s/ ABRAHAM D. SOFAER

Abraham D. Sofaer,
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBERTA GAS CHEMICALS, LTD., *Plaintiff,* v. CELANESE CORPORATION and CELANESE CHEMICAL COMPANY, INC., *Defendants.*	MEMORANDUM OPINION AND ORDER 80 CIV. 1855 (ADS)

ABRAHAM D. SOFAER, D.J.:

Plaintiff's motion to restore this case to the Court's active calendar and to vacate the current stay is granted. On October 10, 1980, the complaint in this case was dismissed for failure to state a claim on which relief could be granted in an opinion that also strongly suggested a lack of jurisdiction. 497 F.Supp. 637 (S.D.N.Y.1980). The opinion further stated that, even if the Court had jurisdiction, the doctrine of primary jurisdiction would preclude its exercise. On May 12, 1981 the Second Circuit issued its opinion on appeal. Without addressing the question of jurisdiction, the Court reversed, invoking the doctrine of primary jurisdiction as a basis for obtaining a determination on plaintiff's claims by the United States International Trade Commission. 650 F.2d 9 (2d Cir. 1981).

On June 17, 1981, plaintiff petitioned the Commission for the determinations suggested by the Court of Appeals. Meanwhile, however, the Commission ruling which had prejudiced plaintiff was reversed by the Court of International Trade, in which decision the Commission acquiesced. *Alberta Gas Chemicals, Inc.* v. *United States,* 515 F.Supp. 780 (U.S.C.I.T. 1981). In August 1981, the Commission refused to entertain plaintiff's

application, reasoning that the reversal of the Commission's order against plaintiff had corrected the injury plaintiff allegedly had suffered. In addition, the Commission held that it lacked authority to conduct a proceeding to determine whether, as plaintiff alleged, the defendants had committed perjury, because that was a criminal charge over which only the Department of Justice had jurisdiction. Consequently, while the Commission dismissed the petition, it referred the charge to the Department of Justice for possible prosecution.

Defendants have cross-moved for judgment on the pleadings, and for dismissal. Nothing in the ruling of the Court of Appeals suggests any reason to correct the grounds relied upon in dismissing plaintiff's complaint. The defendants' motion for judgment on the pleadings is granted, and the complaint is dismissed, for the reasons stated in the opinion reported at 497 F.Supp. 637. Fed. R. Civ. Proc. 12(b)(1) and 12 (b)(6).

SO ORDERED.

Dated: New York, New York
December 11, 1981

/s/ ABRAHAM D. SOFAER

Abraham D. Sofaer
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of May one thousand nine hundred and eighty-two.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE J. EDWARD LUMBARD
HONORABLE JON O. NEWMAN
Circuit Judges.

ALBERTA GAS CHEMICALS, LTD.

Plaintiff-Appellant,

—against—

CELANESE CORPORATION AND
CELANESE CHEMICAL COMPANY, INC.

Defendants-Appellees.

82-7041

N.B. SINCE THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT AND IS NOT UNIFORMLY AVAILABLE TO ALL PARTIES, IT SHALL NOT BE REPORTED, CITED OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED on the basis of Judge Sofaer's opinion dated December 11, 1981, which incorporates the reasons stated in his opinion dated October 6, 1980, reported at 497 F. Supp. 637. Costs are awarded to appellee.

/s/ WILFRED FEINBERG,
Chief Judge

/s/ J. EDWARD LUMBARD,

/s/ JON O. NEWMAN,
Circuit Judges.

APPENDIX F

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of July, one thousand nine hundred and eighty-two.

ALBERTA GAS CHEMICALS LTD.,

Plaintiff-Appellant,

v.

CELANESE CORPORATION AND CELANESE CHEMICAL COMPANY, INC.,

Defendants-Appellees.

No. 82-7041

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Alberta Gas Chemicals, Ltd.

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO, Clerk

by:

/s/ FRANCIS X. GINDHART
Francis X. Gindhart
Chief Deputy Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBERTA GAS CHEMICALS, LTD., *Plaintiff,* v. CELANESE CORPORATION AND CELANESE CHEMICAL COMPANY, INC., *Defendants.*	COMPLAINT 80 CIV. 1855 (ADS)

Plaintiff, Alberta Gas Chemicals, Ltd., by its attorneys, Freeman, Meade, Wasserman & Schneider, complaining of defendants respectfully alleges:

1. Alberta Gas Chemicals, Ltd. ("Alberta Gas") is a corporation organized and existing pursuant to the laws of Canada and maintains its principal place of business in the Province of Alberta. Alberta Gas is the largest Canadian producer of methyl alcohol ("methanol") and is the largest Canadian exporter of methanol to the United States.

2. Upon information and belief, defendant Celanese Corporation ("Celanese") is a corporation organized and existing pursuant to the laws of the State of New York, maintaining its principal place of business at 1211 Avenue of the Americas, New York, New York. Celanese, with its subsidiaries, is the world's largest producer of methanol.

3. Upon information and belief, defendant Celanese Chemical Company, Inc. ("Celanese Chemical") is a corporation organized and existing pursuant to the laws of the State of Texas. Celanese Chemical is licensed and authorized to

conduct business and maintains its principal place of business at 1211 Avenue of the Americas, New York, New York.

4. Upon information and belief, Celanese Chemical is a wholly-owned subsidiary of Celanese and Celanese controls and directs the policies and operations of Celanese Chemical.

5. Jurisdiction of this Court is based on diversity of citizenship (28 U.S.C. 1332). The amount in controversy, exclusive of costs and interest, exceeds $10,000.

FIRST CLAIM FOR RELIEF

6. On May 15 and 16, 1979, pursuant to 19 U.S.C. 160, *et seq.*, hearings were held before the United States International Trade Commission (the "Commission") relating to the importation of methanol from Canada into the United States. The issues before the Commission were whether the sales by Alberta Gas were injuring or likely to injure the United States methanol producing industry. In the proceeding, Celanese Chemical submitted oral and written testimony to the Commission, including testimony concerning the future supply of and demand for methanol in the United States.

7. On June 21, 1979, the Commission unanimously determined that imports of methanol from Canada were not presently injuring the domestic methanol industry. However, the Commission did determine (in a three to two decision) that, based upon the evidence before it, imports of methanol from Canada were likely to injure the domestic methanol producing industry in the future.

8. As part of an unlawful scheme and plan designed, among other things, to delay or prevent Alberta Gas from constructing additional facilities to produce methanol in Alberta, Celanese Chemical intentionally presented materially false and misleading testimony to the Commission relating to the principal issues before the Commission, including (i) the failure to disclose Celanese's plans for the substantial expansion

of its (or its subsidiaries') methanol producing facilities in Alberta and the United States, and (ii) the projected demand for methanol. That testimony was intended to be relied upon by the Commission and to injure Alberta Gas.

9. In response to questioning by the Commission relating to the expansion plans of Celanese and Celanese Chemical, Celanese Chemical deliberately failed to disclose that a subsidiary of Celanese, Celanese Canada Limited, or another subsidiary of Celanese, was planning to construct and operate a $255 million facility for the production of methanol in Alberta, Canada, and that the principal market for that methanol would be the United States. In addition, Celanese Chemical deliberately failed to disclose that Celanese was planning to construct and operate in the United States the world's largest methanol producing facility.

10. Celanese Chemical testified to the Commission that the demand for methanol in the United States would not increase during the 1980's at a rate in excess of 6% to 7% per annum. In fact, Celanese and Celanese Chemical believed at the time said testimony was given that the demand for methanol in the United States during that period would increase at a rate of at least 10% per annum.

11. Upon information and belief, had Celanese Chemical stated the truth as it was known to it with respect to Celanese (and its subsidiaries') plans for the expansion of their methanol producing facilities and the demand for methanol in the United States, the Commission would not have found that there was a likelihood of future injury to the United States methanol industry by reason of the sale of methanol to the United States by Alberta Gas.

12. As a result of the unlawful scheme and plan of Celanese and Celanese Chemical and the materially false and misleading testimony of Celanese Chemical, Alberta Gas has sustained and will sustain substantial and irreparable damage in a number of respects, including, but not limited to, its efforts

to sell methanol in the United States and elsewhere and its ability to expand its production facilities in Alberta, Canada.

13. Plaintiff lacks an adequate remedy at law.

SECOND CLAIM FOR RELIEF

14. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 12 above as if fully set forth at length hereat.

15. By reason of the unlawful scheme and plan of Celanese and Celanese Chemical and the materially false and misleading statements made by Celanese Chemical, Alberta Gas has sustained damage in a sum to be determined, including, but not limited to, amounts necessary to compensate Alberta Gas for losses sustained in connection with reduced sales of methanol in the United States, liability for special duties on sales of methanol to the United States, loss of business in the United States and elsewhere as a result of damage to Alberta Gas's reputation as a steady source of supply of methanol and further delay in the construction of additional production facilities in Alberta, Canada.

WHEREFORE, plaintiff demands judgment:

(a) On its first claim for relief for a mandatory injunction requiring Celanese and Celanese Chemical to disclose to the United States International Trade Commission the material and truthful facts relating to:

(i) Celanese's plans for the expansion of its methanol producing facilities (and that of its subsidiaries) during the 1980's; and

(ii) Celanese's estimate of demand for methanol in the United States during the 1980's.

(b) On its second claim for relief, damages in a sum to be determined by the Court, including a reasonable award of counsel fees and punitive damages.

(c) The costs and disbursements of this action.

(d) Such other and further relief as to the Court may seem just and proper.

FREEMAN, MEADE,
WASSERMAN &
SCHNEIDER

By /s/ MELVYN FREEMAN
A Member of the Firm

Attorneys for Plaintiff
551 Fifth Avenue
New York, New York 10017
(212) 697-6464

APPENDIX H

UNITED STATES
INTERNATIONAL TRADE COMMISSION
WASHINGTON, D. C. 20436

August 20, 1981

FREEMAN, MEADE, WASSERMAN & SCHNEIDER
Attorneys and Counsellors At Law
90 John Street
New York, New York 10038

Attention: Jack Gumpert Wasserman, Esq.

Re: Action Request No. 81-22:
In the Matter of *Methyl Alcohol From Canada,*
Investigation No. AA1921-202

Dear Mr. Wasserman:

This letter is to advise you of the Commission's decision and the action to be taken with respect to the petition of Alberta Gas Chemicals, Ltd. and Alberta Gas Chemicals, Inc. for a determination in conformity with the decision of the United States Court of Appeals for the Second Circuit dated May 12, 1981, *Alberta Gas Chemicals, Ltd. v. Celanese Corporation and Celanese Chemical Company, Inc.*,—F.2d—(2d Cir., Docket No. 80-921).

On August 19, 1981, by a 4-to-0 vote,[1] the Commission denied the petitioners' request for a determination of the issues presented.

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[1] The petition was considered and voted upon by the individual Commissioners in an "action jacket" circulated sequentially (control No. GC-81-093, initiated on July 30, 1981). Ratification of the Commission action taken therein will be by formal vote of the Commissioners as agenda item No. 3 at the Commission meeting on Wednesday, August 26, 1981. *See* 19 C.F.R. § 201.34.

The Commission reached that decision on the basis of several factors. Although the allegations set forth in the petition presented a new (and more indirect) basis for challenging the determination of the likelihood of injury, the Commission concluded that the U.S. Court of International Trade's recent reversal of the contested determination and the Commission's subsequent decision not to appeal that judgment[2] obviated the necessity for reopening the Canadian methanol matter merely for the purpose of deciding—albeit on new grounds—the correctness of what has already been judicially determined to be an erroneous decision. Moreover, the court's reversal and the Commission's acquiescence have effectively rendered the determination in question a nullity; hence, the petitioners no longer have a valid cause of action on the merits of that determination. For those reasons, the Commission declined to determine the materiality of the challenged representations to the majority's conclusion of the likelihood of injury.

Conversely, with respect to the fraud and perjury issues, the Commission concluded that protecting the integrity of its proceedings is a matter of critical importance, and, for that reason, a formal inquiry should be conducted in order to ascertain the truth and veracity of the petitioners' claims. But owing to the nature of the misconduct alleged (*see* 18 U.S.C. §§ 1001 and 1621) and the jurisdictional limitations which constrain the Commission from making findings of fact and conclusions concerning violations of criminal law, the Commission declined to determine the fraud and perjury charges, concluding that a Commission adjudication of such claims would be *ultra vires*.

However, while the Commission is not competent to make the determination requested, the Attorney General of the United States is expressly empowered to appoint officials to

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[2] On July 6, 1981, by a 3-to-0 vote (Commissioner Bedell abstaining), the Commission decided not to appeal the judgment and order of the court. *See* action jacket, control No. GC-81-080, initiated on June 25, 1981.

detect and prosecute crimes against the United States. (*See* 18 U.S.C. § 533.) Consequently, the Commission is referring the petitioners' claims to the United States Department of Justice for investigation by the Criminal Division and such other action as the facts and circumstances may warrant.

Copies of the letters which are being sent to special counsel for the Celanese Corporation and delivered to the Assistant Attorney General are enclosed for your information.

Very truly yours,

/s/ MICHAEL H. STEIN

MICHAEL H. STEIN
General Counsel

Enclosures

cc. James M. Brachman, Esq.
Freeman, Meade, Wasserman & Schneider

Alfred R. McCauley, Esq.
Graubard, Moskovitz & McCauley

Asa Rountree, Esq.
Standish F. Medina, Esq.
Debevoise and Plimpton

D. Lowell Jensen, Esq.
Assistant Attorney General
The United States Department of Justice
Criminal Division

David M. Cohen, Esq., Director
Sheila N. Ziff, Esq., Trial Attorney
The United States Department of Justice
Civil Division
Commercial Litigation Branch

The United States International Trade Commission
The Secretary
Director of Investigations
Office of the General Counsel